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No. 93-670

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1993

ALBERT HOWLETT,

Petitioner,

vs.

BIRKDALE SHIPPING CO., S.A.,

Respondent.

On Writ of Certiorari To The
United States Court of Appeals
for the Third Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

1. Does not the shipowner's duty of care owed to a longshoreman under Section 5(b) of the Longshore and Harbor Workers' Compensation Act extend to unsafe conditions existing in a cargo stow of which the shipowner knows or is deemed to know by reason of a duty of inspection, and which are unknown to the longshoreman and his stevedore employer, are not open and obvious, and would not normally be anticipated?

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3. The Third Circuit's holding in *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3rd Cir. 1987), that the shipowner's duty of inspection does not extend to the manner in which cargo is stowed aboard a vessel by a loading stevedore, is in conflict with the principle of land-based law which requires that the employer of an independent contractor inspect the work of that contractor. 25

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No. 93 - 670

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

ALBERT HOWLETT,
Petitioner,

v.

BIRKDALE SHIPPING CO., S.A.,
Respondent.

On Writ of Certiorari To The
United States Court of Appeals
for the Third Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The judgment order of the United States Court of Appeals for the Third Circuit affirming the decision of the United States District Court for the Eastern District of Pennsylvania

is officially reported at 998 F.2d 1003 (3rd Cir. 1993), and is reproduced in the Joint Appendix at page 52.

The order of the United States Court of Appeals for the Third Circuit denying petitioner's petition for rehearing in banc is not officially reported, and is reproduced in the Joint Appendix at page 54.

The opinion of the United States District Court for the Eastern District of Pennsylvania granting summary judgment against petitioner is not officially reported, and is reproduced in the Joint Appendix at page 42.

The opinion of the United States District Court for the Eastern District of Pennsylvania denying petitioner's motion for reargument is not officially reported, and is reproduced in the Joint Appendix at page 49.

JURISDICTION

The judgment order of the United States Court of Appeals for the Third Circuit affirming the judgment of the United States District Court for the Eastern District of Pennsylvania (J.A. 52) was entered on June 30, 1993. The order of the United States Court of Appeals for the Third Circuit denying petitioner's petition for rehearing in banc (J.A. 54) was entered July 30, 1993. The petition for a writ of certiorari was filed on October 28, 1993. This Court granted a writ of certiorari limited to Question 1 presented by the petition on January 10, 1994. The jurisdiction of this Court is invoked under 28. U.S.C. § 1254(1).

STATUTE INVOLVED

Section 5(b) of the Longshore and Harbor Workers' Compensation Act, as amended in 1972, Pub. L. 92-576, 86 Stat. 1251, and further amended in 1984, Pub. L. 98-426, 98 Stat. 1641, 28 U.S.C. § 905(b).

(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. . . . The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

LEGISLATIVE HISTORY INVOLVED

The legislative history accompanying the 1972 Amendments to the Longshore and Harbor Workers' Compensation Act appears in House Report No. 72-1441, and is reprinted in 1972 U.S. Code Cong. & Adm. News, Vol. 3, beginning at page 4698. The portion relating to Section 5(b) of the Act, titled "Elimination of Unseaworthiness Remedy," begins at page 4701 and is reproduced in the Appendix to the petition for a writ of certiorari filed herein beginning at page 18a.

STATEMENT OF THE CASE

Statement of Facts

This case was decided in the courts below on a motion for summary judgment filed by the respondent. Petitioner, in response to this motion, presented deposition testimony establishing the following facts:

Petitioner was injured while working as a longshoreman and engaged in discharging a cargo of bags of cocoa beans from the No. 2 hold of respondent's ship (J.A. 5). Petitioner was injured when he stepped down off the cargo, a distance of approximately three feet, to an area of the deck of the hold from which several bags of cocoa beans had just been removed (J.A. 9-10). When he stepped down into this space, he slipped and fell (J.A. 9, 15), suffering a severe injury which has left him permanently disabled from returning to work as a longshoreman.

The cause of petitioner's slipping and falling was the presence on the deck of a sheet of clear plastic which covered the area of the deck from which the bags had just been removed (J.A. 9, 11, 17-18). The presence of plastic on the deck of the ship under the stow of cocoa beans admittedly was an improper condition (J.A. 33-34). Instead, it is the customary and correct practice to place wood or paper, or a combination of both, on a steel deck under a stow of bags of cocoa beans to prevent damage to the bags as a result of condensation (J.A. 14-15, 20-21, 27-28, 31). Sheets of plastic are not normally used for this purpose, and petitioner and another longshoreman witness testified that they had never seen or heard of plastic being used for this purpose, and that they were not warned or otherwise informed of its use on this particular occasion (J.A. 12, 16, 18, 40). For this reason,

petitioner had no reason to anticipate that, in stepping down onto the deck, he would be stepping onto a slippery surface created by the presence of a sheet of smooth plastic on the deck.

Petitioner testified that the cause of his slipping and falling was the presence of the plastic on the deck and that plastic is more slippery than wood or paper because wood or paper will "grab" and "hold" a metal deck (J.A. 18).

Petitioner also testified that he did not see that plastic was on the deck as he was stepping off the cocoa beans because it was a clear plastic which was dirty and had debris on it (J.A. 12-13), and that he thought he was stepping down onto paper (J.A. 13).[1]

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[1] The bags of cocoa beans were made up into units which were approximately four feet long, four feet wide and three feet high. The procedure followed in discharging the cocoa beans was that four units would be lifted a few feet above the stow using the ship's boom. At that point, they would be held in the air in that position to allow time for the longshoremen working in the hold to go to a place of safety -- in this case behind a container which was in the after end of the hold -- so they would be out of danger if the bags broke or fell while being lifted out over their heads. Once the longshoremen in the hold were safely out of the way, the bags would be lifted from the hold. The reason petitioner was stepping off the stow of cocoa beans at the time he was injured was that he had to cross over the area of the deck from which the bags had just been removed in order to go to the position of safety behind the container (J.A. 10).

The reason petitioner did not see the plastic before the accident was that the units of cocoa beans had been stowed on top of each other in the hold, and the four units which were being removed at the time petitioner was injured were the first units taken out which actually had been resting on the ship's deck (J.A. 9). Before that the deck was obscured by the bags of cocoa beans and was not visible to the longshoremen (J.A. 6-7).

The evidence further established that the plastic had to have been placed under the bags of cocoa beans by the loading stevedore in Guayaquil, Ecuador, where the cocoa beans were loaded aboard the ship. With respect to how the plastic came to be under the bags of cocoa beans, the Captain of the ship testified that the ship *required* that the loading stevedore place some material on the ship's steel deck under a stow of cocoa beans to prevent condensation damage,[2] that this material -- and, indeed, *all* material used in loading the cocoa beans -- was supplied to the loading stevedore by the ship (J.A. 25, 30), and that, normally, wood or paper would be supplied (J.A. 27). However, the ship carried rolls of plastic for use in the loading of cargo (J.A. 25-27), and, in view of this testimony, and the testimony that the ship provided the loading stevedore with all the materials needed in the loading of the cocoa beans (J.A. 25), respondent had no alternative but to admit that it had supplied the loading stevedore with the plastic that was under the cocoa beans at the time petitioner was injured.[3]

There also was evidence of the practice on the ship for the crew to observe cargo loading and unloading operations. In this regard, the ship's Captain testified that the normal practice was to have an officer and three sailors observing

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[2]Initially, the Captain of the ship testified that the decision as to whether any material would be placed under the cocoa beans was made by the loading stevedore (J.A. 31), but, on cross-examination, he admitted that the ship *required* the loading stevedore to put some material under the cocoa beans, and that the loading stevedore had no discretion not to do so (J.A. 34-36).

[3]Respondent admitted to supplying the plastic in briefs filed in the District Court and the Court of Appeals, and repeated this admission in its Brief in Opposition to the Petition for Writ of Certiorari filed herein, at page 2.

cargo operations, both during loading in Guayaquil (J.A. 22), and discharging in Philadelphia (J.A. 25), and that if plastic had been placed under the cocoa beans during loading in Guayaquil, these crew members should have seen it and would have reported it to him or to one of the ship's mates (J.A. 24-25).[4]

The Course of Proceedings

In the district court, respondent's motion for summary judgment was determined on the basis that the law applicable

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[4]The Captain testified:

Q. . . . What is your practice with respect to how many men from the ship's crew are on deck of the vessel watching the loading of cargo when the ship is in Guayaquil?

A. Normally be three sailors and one guard, an officer. (J.A. 22)

* * * * *

Q. And that would start from the beginning -- from the time the longshoremen come on the ship until the longshoremen finish?

A. Yes.

Q. So that if sheets of plastic were being put on the deck for the -- before the cargo -- the cocoa beans were being loaded, they should be able to see that plastic being placed on the deck and stop it?

A. Yes. (J.A. 23)

* * * * *

Q. So that if plastic was placed on the deck under the cocoa beans in Guayaquil in July of 1989, one of the crew members should have seen it?

* * * * *

A. Affirmative. And he would have advised me or one of the ship mates. (J.A. 24)

to the case was governed by the Third Circuit's decision in *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3rd Cir. 1987), *cert. denied*, 486 U.S. 1007 (1988). In *Derr*, the Third Circuit had held that a ship had no duty to inspect the manner in which cargo was stowed by a loading stevedore, and could be held liable for a hazardous condition created by improper stowage only if the ship had both "actual knowledge" of the condition and the danger was not "open and obvious," see *Derr*, *supra*, 835 F.2d at 496.

Petitioner, in opposing the motion for summary judgment, argued that the case fell within the *Derr* parameters, contending, first, that the admission that the ship had supplied the plastic to the loading stevedore, coupled with the testimony as to the practice of the ship's crew to observe loading operations, was sufficient to create an issue of fact as to whether the ship had "actual knowledge" of the presence of the plastic under the stow of cocoa beans, and, second, that the presence of the plastic on the deck was not "open and obvious" to petitioner as the deck area where petitioner fell had just been exposed by the removal of cargo, and petitioner reasonably believed that, in stepping down off the cargo, he was stepping down onto paper.

The district court rejected these arguments as a basis for distinguishing *Derr*, holding, first, that the evidence that the ship had supplied the plastic to the loading stevedore did not imply knowledge of how it would be used by the loading stevedore, and, second, that the presence of the crew during the loading operation did not satisfy the *Derr* knowledge requirement because, if the plastic was observable by the crew during the loading operation, then it was an "open and obvious" condition for which a shipowner was not liable (J.A. 45-46). These holdings were affirmed by the Third Circuit by a judgment order without an opinion being filed (J.A. 52).

In the petition for writ of certiorari filed herein, petitioner sought review of two questions. Question No. 1 sought review of the *Derr* holding that a vessel had no duty of inspection to discover dangerous conditions existing in a cargo stow. Question No. 2 sought review of the question of whether evidence of the specific practice of the crew of a ship of observing cargo loading operations gave rise to a duty of care with respect to conditions which such observations might reasonably be expected to disclose. This Court's grant of a writ of certiorari was limited to Question 1 presented by the petition.

In the context of the Third Circuit's decision in *Derr v. Kawasaki Kisen K.K.*, *supra*, and this Court's decision in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981), Question No. 1 encompasses two subsidiary questions: First, to what extent does the shipowner's duty of care owed to a longshoreman extend to dangerous conditions existing in a cargo stow? Second, what is the scope of the shipowner's duty of care with respect to a dangerous condition existing in a cargo stow if that dangerous condition is "open and obvious?" This brief, in addressing Question No. 1 presented by the petition, will address both these subsidiary questions.

SUMMARY OF ARGUMENT

1. In *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981), this Court held that, under Section 5(b) of the Longshore and Harbor Workers' Compensation Act, a shipowner owes to a stevedore and to its longshoremen employees the duty to furnish them with a vessel which is in such condition that they will be able to carry on their cargo operations with reasonable safety. This duty extends to dangerous conditions existing at the start of cargo operations,

and, as to such conditions, the shipowner has a duty of inspection, and is deemed to be "chargeable with knowledge."

2. A dangerous condition existing in a cargo stow as a result of the manner in which that cargo was stowed in a prior loading port, such as caused petitioner's injury in the instant case, is, to an unloading longshoreman, a dangerous condition existing at the start of cargo operations, and, therefore, is a condition for which the vessel is responsible under the principles set forth in *Scindia, supra*. Under these principles, petitioner's evidence established a *prima facie* case of vessel negligence, and it was error to grant summary judgment against him.

3. In *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3rd Cir. 1987), the Third Circuit held that a shipowner's duty of inspection did not extend to dangerous conditions existing in a cargo stow. *Derr* was wrongly decided and should be rejected for the following reasons:

(1) In *Derr*, the Third Circuit wrongly interpreted this Court's decision in *Scindia* as relieving vessels from responsibility for conditions created by *any* stevedore, even though that stevedore was not the employer of the injured longshoreman. *Scindia* did not so hold. Rather, the holding of *Scindia* was that a vessel was entitled to rely on a longshoreman's stevedore *employer* to protect the longshoreman from injury from conditions arising within the confines of the stevedoring operations assigned to the *employer*. The basis for this holding was that, as to conditions arising within the confines of the cargo operations assigned to the employer, the employer was subject to a statutory duty under Section 41 of the Longshore and Harbor Workers' Compensation Act to provide its employees with a safe place to work, and, as between the shipowner and an

employer stevedore, with respect to such conditions, the employer, rather than the shipowner, was in the best position to protect a longshoreman from injury. Neither of these factors are present where, as in the instant case, a longshoreman is injured as a result of a dangerous condition created by a loading stevedore. The loading stevedore is not the injured longshoreman's employer and owes him no duty of care under Section 41 of the Act, and the injured longshoreman's employer, not being the stevedore who loaded the cargo, is not in a position prevent the creation of the hazardous condition.

(2) As set forth in Section 5(b)'s legislative history, Congress' principle objective in creating a negligence remedy for longshoremen was to encourage care by vessel operators in providing longshoreman with a safe place to work. Where a dangerous condition is created in a cargo stow as a result of the manner in which the cargo was loaded by a loading stevedore, as between the ship and the unloading stevedore, it is the ship which is in the best position to take steps to prevent the creation of the dangerous condition. The *Derr* holding relieving the ship from responsibility for the manner in which cargo is stowed eliminates the incentive on the shipowner to discover and eliminate dangerous conditions in a cargo stow, contrary to the intention of Congress that the negligence remedy created in Section 5(b) of the Act be applied in a manner which would encourage vessel safety.

(3) In enacting Section 5(b) of the Act, Congress directed that the shipowner's liability for negligence be based on principles similar to that applicable to land-based parties in similar circumstances. Under principles of land-based law, the employer of an independent contractor has a duty to make reasonable (not continuing) inspections of work assigned to an independent contractor to ascertain and correct any hazardous

conditions. This principle should be applied to maritime negligence actions under Section 5(b) of the Act. Requiring such reasonable inspections would impose no additional burden on shipowners, as it already is the custom and practice in the maritime industry for the crew of a vessel to observe both cargo loading and cargo unloading operations.

(4) The *Derr* holding that stowed cargo is not part of the "work space" of a vessel is illogical and unrealistic, and is contrary to the Congressional direction, manifested in Section 5(b)'s legislative history, that the ship's duty of care was to extend to dangerous "conditions" of which the vessel knew or should have known.

(5) Contrary to the Third Circuit's decision in *Derr*, the 1972 Amendments to Section 5(b) of the Act were not intended to grant shipowners relief from the acts of stevedores, but, on the contrary, were intended to provide relief for stevedore employers from indemnity claims by shipowners. The *Derr* holding, which relieves shipowners from responsibility for the manner in which cargo is stowed by a loading stevedore, defeats both the statutory objective of providing relief for stevedores, and the statutory objective of providing a negligence remedy which would promote vessel safety.

(6) The *Derr* holding that a shipowner has no duty of care with respect to dangerous conditions existing in a cargo stow which are "open and obvious" is contrary to this Court's decision in *Scindia, supra,* and to the decisions of every other appellate court which has had occasion to consider the issue. Moreover, the condition which caused petitioner's injury in the instant case was not "open and obvious" to him or to his stevedore employer.

ARGUMENT

1. Under the principles set forth in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981), a shipowner owes to longshoremen working aboard a vessel a duty of reasonable care under the circumstances. This duty extends to dangerous conditions existing at the start of cargo operations, including dangerous conditions existing in a cargo stow.

In 1972, Congress, in adopting what became Section 5(b) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b), eliminated the longshoreman's right to bring suit against a vessel on the no-fault theories of unseaworthiness and non-delegable duty to provide a safe place to work, and replaced it with the right to bring suit on the fault based theory of negligence.[5] Congress' expressed objective in making vessel operators liable in damages for negligently caused injuries was to encourage care by vessel operators in providing longshoremen with a safe place to work.[6]

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[5]Section 5(b) provides, in pertinent part:

"(b) In the event of injury to a person covered under this chapter caused by the *negligence of a vessel*, then such person . . . may bring an action against such vessel as a third party . . . , and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreement or warranties to the contrary shall be void. . . . The liability of the vessel under this subsection *shall not be based upon the warranty of seaworthiness or a breach thereof* at the time the injury occurred." (Emphasis supplied)

[6]The legislative history states:

"Permitting actions against the vessel based on negligence will meet the objective of *encouraging safety* because the vessel will still be required to exercise the same care as a land-based person in providing a *safe place to work*. Thus, nothing in this bill is intended

(continued...)

Congress did not set forth the specific details of the negligence remedy which it had created. Rather, this was to be developed by the courts "through the application of accepted principles of tort law and the ordinary process of litigation," subject only to the mandates that an injured longshoreman "shall be in no less favorable position *vis-a-vis* his rights against the vessel as a third party than is an employee who is injured on land," and that the vessel's liability likewise should be similar to that of land-based parties engaged in non-maritime pursuits.[7]

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[6](...continued)
to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition." House Report No. 92-1441, 1972 U.S. Code. Cong. and Adm. News 4698, at 4704, reproduced in the Appendix to the Petition for Writ of Certiorari filed herein at pp. 21a-22a. (Emphasis supplied)

Congress specifically rejected the suggestion that the longshoreman's right to sue for damages be eliminated entirely in favor of a workmen's compensation remedy, stating --

". . . . The Committee rejected the proposal, originally advanced by the industry, that vessels should be treated as joint employers of longshoremen or other persons covered under this Act working on board such vessels. This would result in restricting the vessel's liability in all cases to the compensation and other benefits payable under the Act. The Committee believes that where a longshoreman or other worker covered under this Act is injured through the fault of the vessel, the vessel should be liable for damages as a third party, just as land-based third parties in non-maritime pursuits are liable for damages when, through their fault, a worker is injured." Ibid at 4702, Appendix to the Petition for Writ of Certiorari filed herein at p. 18a.

[7]House Report No. 92-1441, 1972 U.S. Code. Cong. and Adm. News 4698, at 4704, reproduced in the Appendix to the Petition for Writ of Certiorari filed herein at p. 22a.

In *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981), this Court, citing *Marine Terminals v. Burnside Shipping Co.*, 294 U.S. 404 (1969), held that the "vessel owes to the stevedore and his longshoremen employees the duty of exercising due care 'under the circumstances,'" *Scindia, supra,* 451 U.S. at 166, and that this duty extended, at least, to providing them with a ship which was in such condition that cargo operations could be carried on with reasonable safety to persons and property, and to warning them of hazards which might not be known or anticipated by them, *Scindia, supra,* 451 U.S. 166-167.[8]

The principle issue in Scindia was the relative responsibilities of the vessel and the injured longshoreman's stevedore employer in fulfilling the obligation to provide longshoremen with a safe place in which to work. Noting that a stevedore employer had a statutory duty to provide its employees with a "reasonably safe" place to work under Section 41 of the Act, 33 U.S.C § 941, and the reasonable expectation of the vessel that the stevedore would perform its work without supervision from the vessel, *see Scindia, supra,* 451 U.S. at 170, this Court distinguished between hazardous conditions existing at the start of cargo operations by the longshoreman's stevedore

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[8]This duty was more fully set forth as follows, 451 U.S. at 166-167:

". . . . This duty extends at least to exercising ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property, and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work."

employer, and hazardous conditions which might arise subsequently, during the course of those cargo operations.

It was accepted without dispute in *Scindia* that the vessel's duty of care extended to conditions existing at the *start* of cargo operations, *see Scindia, supra, 451 U.S at 167,* and not only did the *Scindia* opinion recognize that the vessel had a duty of inspection with respect to such conditions, but, as was noted several times, as to conditions existing at the start of cargo operations, the vessel was deemed to be "chargeable with knowledge."[9]

However, once cargo operations began, *Scindia* held that the vessel had no continuing duty of supervision or inspection to discover dangerous condition which might arise within the confines of the cargo operations. This Court concluded, *Scindia, supra, 451 U.S. at 172:*

> ". . . absent contract provision, positive law, or custom to the contrary . . . the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore."

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[9]The phrase "chargeable with knowledge" or similar language appears throughout the *Scindia* opinion, *see Scindia, 451 U.S. at 168, 175, 176, 178.*

Cf. Kirsch v. Plovidba, 971 F.2d 1026, 1029 (3rd Cir. 1992):

> ". . . . But *Scindia* does not cast any doubt on the shipowner's duty to inspect the ship for hazards *before* turning the ship over to the stevedore, because inspection is integral to providing the stevedore with a reasonably safe workplace, a duty the *Scindia* explicitly recognized." (Emphasis in original)

To a longshoreman engaged in unloading cargo from a ship, a dangerous condition caused by the manner in which the cargo being unloaded was stowed in a previous loading port is, for him, a condition existing at the start of cargo operations. Under the decision in *Scindia, supra,* this would be a condition with respect to which the vessel would be deemed "chargeable with knowledge," and would have a duty of reasonable care.

Other than the Third Circuit's decision in *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3rd Cir. 1987), every court which has had occasion to consider this issue has so held, see *Woods v. Sammisa Co., Ltd.*, 873 F.2d 842, 847-849 (5th Cir. 1989), *cert. denied*, 493 U.S. 1050 (1990), *Harris v. Flota Mercante Grancolombiana, S.A.*, 730 F.2d 296 (5th Cir. 1984), *Lemon v. Banks Lines, Ltd.*, 656 F.2d 110 (5th Cir. 1981), *Riggs v. Scindia Steam Nav. Co.*, 8 F.3d 1442 (9th Cir. 1993), *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982), *cf. Gill v. Hango Ship-Owners/AB*, 682 F.2d 1070 (4th Cir. 1982).

Under the foregoing cases, and the principles set forth in *Scindia, supra,* it is clear that the evidence presented by petitioner in the instant case would establish a *prima facie* case of vessel negligence, thereby precluding the granting of summary judgment, and requiring reversal of the judgment below. The sheet of plastic which was on the deck under the cocoa beans admittedly should not have been there (J.A. 33-34); it created a hazardous condition for longshoremen working in the hold because it presented a more slippery walking surface than wood or paper which should have been there (J.A. 18); it was not a condition of which the longshoremen had been warned (J.A. 12, 16, 18, 40), nor was it one which they could be expected to anticipate, as wood or paper

is normally used under a stow of cocoa beans (J.A. 14-15), and petitioner thought that he was stepping down onto paper (J.A.13). Being under the stow of cocoa beans, it necessarily was a condition existing at the start of cargo operations for which the vessel was "chargeable with knowledge," and, finally, it admittedly was a condition which the crew of the ship could have and should have observed at the time the cocoa beans were loaded (J.A. 22-24).

2. The Third Circuit's holding in *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3rd Cir. 1987), on which the decision below is based, that the shipowner's duty of inspection does not extend to the manner in which cargo is stowed aboard a vessel, is contrary to the principles governing vessel liability set forth in this Court's decision in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981), and in the Act's legislative history.

The decision below granting respondent's motion for summary judgment, was based on the Third Circuit's decision in *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3rd Cir. 1987), *cert. denied*, 486 U.S. 1007 (1988). In *Derr*, the Third Circuit had held that the vessel's duty of inspection did not extend to dangerous conditions existing in a cargo stow. To reach this conclusion, the Third Circuit reasoned that when this Court, in *Scindia,* held that the vessel had no duty by way of supervision or inspection to discover dangerous conditions which might arise within the confines of the cargo operations assigned to the stevedore, *Scindia, supra,* 451 U.S. at 172, it meant not only the cargo operations assigned to the injured longshoreman's stevedore employer, but included cargo operations performed by a loading stevedore, even though that loading stevedore was not the employer of the injured long-

shoremen, and the cargo loading operations involved were performed at a different time, in a different port and, more often than not, in a different country, *Derr, supra,* 835 F.2d at 493-495.

As will be set forth herein, the *Derr* decision is in error. Its interpretation of *Scindia* is incorrect, and its holding is in conflict with the Congressional mandate that the negligence remedy created by Section 5(b) of the Act be implemented in a manner which will encourage vessel operators to exercise reasonable care to provide longshoremen with a safe place to work.

This Court's holding, in *Scindia,* that the vessel had no continuing duty to inspect the cargo operations being performed by an injured longshoreman's stevedore employer, was premised on the fact that an "employer" stevedore had a *statutory* duty under Section 41 of the Longshore and Harbor Workers Compensation Act, 33 U.S.C. § 941, to provide its employees with a reasonably safe place to work, 451 U.S. at 170, and that, *during* cargo operations, it was the employer who was in the best position to take steps to avoid accidents to longshoremen, 451 U.S. at 171. It was on this basis that this Court held that, at least in the first instance, the vessel was entitled to rely on the longshoremen's stevedore employer to protect its own employees from injury, 451 U.S. at 172.

Neither of the forgoing considerations are present when, as in the instant case, a longshoreman is injured as a result of a dangerous condition arising from the unsafe manner in which cargo was stowed in a loading port. The stevedore who loaded the cargo is not the employer of the injured longshoreman and would not owe him a statutory duty of care under Section 41 of the Act, and the injured longshoreman's employer, not being the stevedore who loaded the cargo,

would not be in a position to prevent or correct a dangerous condition arising from the manner in which that cargo was stowed. In these circumstances, not only is there no basis on which the longshoreman's stevedore employer can be considered to be in the best position to prevent the accident, but, instead, by reason of having to pay workmen's compensation benefits to an injured employee, the employer, along with the injured longshoreman, becomes a victim of the dangerous condition created by the loading stevedore, *cf. Marine Terminals v. Burnside Shipping Co.*, 294 U.S. 404 (1969).

Where a dangerous condition resulting from the manner in which cargo is stowed by a loading stevedore is involved, as between the vessel and the unloading "employer" stevedore, it is the vessel, not the unloading stevedore, who is best in position to take steps to ensure the safety of unloading longshoremen. The vessel, in hiring the loading stevedore, and being present when the cargo is being loaded, is in a position to choose a reliable stevedore and to make reasonable observations of its work, and thus be able to discover and remedy any hazardous condition created. The significance of these considerations in achieving the Congressional objective of encouraging vessel safety was aptly set forth in *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982), as follows, 651 F.2d at 1304:

> ". . . , imposing a duty on the Owner or Time-Charterer or both in this case *should further the congressional goal of safety*. The foreign stevedore, who is presumably primarily at fault, may in many cases be beyond reach of the court's processes, and the injured longshoreman would be unable to sue it. As between the vessel and the stevedore-employer, the vessel is the only one in a position to ensure the safety of the longshoreman. The offloading stevedore has no control whatsoever over the foreign stevedore. *The vessel, on the other hand, can ensure safety by choosing a reliable foreign stevedore, supervising its work when necessary, and warning the offloading stevedore of concealed dangerous conditions created by the foreign stevedore.* We do not believe that Congress, in enacting a careful scheme of compensation and liability, could have meant to leave the longshoreman to the mercies of foreign stevedores against which he may have no rights or, at least, no practical remedy." (Emphasis supplied)

Both in Section 5(b) of the Act, and in the Act's legislative history, Congress made a very clear and specific distinction between a vessel's relationship with an "employer" stevedore, and a non-employer stevedore. This distinction appears in two places.

First, while Section 5(b) bars suits by vessels against "employer" stevedores, it does not bar a vessel from suing other stevedores whose negligence may have exposed the vessel to liability for damages, *Turner v. Japan Lines, Ltd., supra*, 651 F.2d at 1304. Section 5(b) limits *only* the liability of an *employer* stevedore. The statute provides:

> ". . . and the *employer* shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void." (Emphasis supplied)

Since the Act does not bar the vessel from suing a non-employer loading stevedore, a shipowner found liable to an injured unloading longshoreman for a hazardous condition in a cargo stow may still bring an action against the loading stevedore whose negligence created the condition, and obtain reimbursement for any damages it may be required to pay.

As noted in *Riggs v. Scindia Steam Nav. Co.*, 8 F.3d 1442 (9th Cir. 1993), the existence of this right to sue the non-employer loading stevedore not only serves as a means by which the vessel can obtain reimbursement of any damages it was required to pay, but serves as an incentive on the loading stevedore to do its work properly. The Court stated, *Riggs, supra*, 8 F.3d at 1446:

> "We noted in *Turner* another factor that is also equally applicable to both types of cargo *defects*. We recognized that section 905(b) does not bar a shipowner from recovering against a foreign stevedore, who is not an "employer" within the meaning of the LHWCA, where the stevedore is primarily at fault for the off-loading longshoreworker's injuries. 651 F.2d at 1303-04. As we recently stated in *Carpenter v. Universal Star Shipping, SA*, where we reaffirmed our holding and reasoning in *Turner*: *'The prospect of vessel-initiated actions against foreign stevedores provides foreign stevedores with an incentive to do their work carefully.'*" 924 F.2d 1539 (9th Cir. 1991). (Emphasis supplied)

Second, in the Act's legislative history, Congress made a very specific distinction between a vessel's responsibility for conditions created by an "employer" stevedore and conditions created by other stevedores. In the legislative history, Congress specified various types of conditions for which a vessel formerly was responsible under the warranty of seaworthiness, and for which, under the 1972 Amendments, the vessel no longer would be liable. All of these were conditions created by stevedores who were, in the words of the legislative history, "subject to this Act," -- *i.e.*, American employer stevedores. The legislative history states:

> "Persons to whom compensation is payable under the Act retain the right to recover damages for negligence against the vessel, but under these amendments they cannot bring a damage action under the judicially-enacted doctrine of unseaworthiness. Thus a vessel shall not be liable in damages for acts or omissions of stevedores subject to this Act, *Crumedy v. The J.H. Fisser*, 358 U.S. 423, *Albanese v. Matts*, 382 U.S. 283, *Skibinski v. Waterman SS. Corp.*, 330 F.2d 539; for the manner or method in which stevedore or employees of stevedores subject to this Act perform their work, *A.N.G. Stevedores v. Ellerman Lines*, 369 U.S. 355, *Blassingill v. Waterman S.S. Corp.*, 336 F.2d 367; for gear or equipment of stevedores or employees of stevedores subject to this Act whether used aboard ship, or ashore, *Alaska SS Co. v. Peterson*, 347 U.S. 396, *Italia Stevedoring Co.*, 376 U.S. 315, or for other categories of unseaworthiness which have been judicially established. (Emphasis by underlining supplied)"[10]

The repeated use of the phrase stevedores "subject to this Act" in the legislative history shows that Congress was making a conscious distinction between the vessel's responsibility for conditions arising within the confines of an "employer" stevedore's cargo operations, and conditions created by a non-employer stevedore, a distinction which the decision in *Derr, supra,* fails to recognize.

The decision in *Derr, supra*, is in error because it is based on an equating of the non-employer stevedore's relationship with the vessel with an employer stevedore's relationship

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[10]House Report No. 92-1441, 1972 U.S. Code. Cong. and Adm. News 4698, at 4703-4704, reproduced in the Appendix to the Petition for Writ of Certiorari filed herein at p. 21a

with the vessel, contrary to the clear intention of the Act and its legislative history. Under Section 5(b) of the Act, an employer stevedore, and a loading stevedore, each stand in a *different* legal relationship to the vessel and to an injured longshoreman. The employer stevedore is immune from suit by the vessel, the loading stevedore is not. The employer stevedore is obligated to pay workmen's compensation benefits to an employee longshoreman injured while unloading cargo, the loading stevedore is not. Congress's primary objective in creating a negligence remedy was to encourage safety for longshoreman. For the employer stevedore, the incentive to provide safe working conditions for its longshoremen employees is its statutory duty under Section 41 of the Act, and the exposure to having to pay substantial workmen's compensation benefits if a longshoreman is injured. For the loading stevedore, however, the only incentive is the possible exposure to suit by the vessel, *Riggs v. Scindia Steam Nav. Co.*, *supra*, 8 F.3d at 1446. The Third Circuit's decision in *Derr*, which gives vessel the same right to rely on the loading stevedore which the vessel has to rely on an employer stevedore, operates to destroy both the incentive on the loading stevedore to do its work properly, and the incentive on the vessel to require the loading stevedore to do its work properly. Thus, the decision in *Derr* is wrong, not only because it is wrong in its interpretation of *Scindia*, but because it produces a result which defeats the Act's statutory purpose of encouraging vessel safety. For both these reasons, it should now be rejected.

3. The Third Circuit's holding in *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3rd Cir. 1987), that the shipowner's duty of inspection does not extend to the manner in which cargo is stowed aboard a vessel by a loading stevedore, is in conflict with the principle of land-based law which requires that the employer of an independent contractor inspect the work of that contractor.

The legislative history of the Act contains several references to the Congressional expectation that the negligence remedy it was creating would be based on principles of land-based law, and that the shipowner's liability would be comparable to that of land-based parties under similar circumstances. The legislative history states:

> ". . . The Committee intends that on the one hand an employee injured on board a vessel shall be in no less favorable position *vis a vis* his rights against the vessel as a third party than an employee who is injured on land, and on the other hand, that the vessel shall not be liable as a third party unless it is proven to have acted or have failed to act in a negligent manner *such as would render a land-based third party in non-maritime pursuits liable under similar circumstances*." (Emphasis supplied)[11]

While a literal application of land-based law to maritime negligence actions is not always practical, *Scindia, supra*, 451 U.S. at 168, f.n. 14, various principles of land-based negligence law can and have been applied to longshoremen's

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[11]House Report No. 92-1441, 1972 U.S. Code. Cong. and Adm. News 4698, at 4704, reproduced in the Appendix to the Petition for Writ of Certiorari filed herein at p. 22a.

negligence actions, *see, e.g., Kirsch v. Plovidba*, 971 F.2d 1026, 1031-1033 (3rd Cir. 1992).

The relationship between a vessel and a stevedore is similar to the land-based relationship between the owner of property and an independent contractor hired to perform work on that property, and under land-based law, the property owner has a duty to make reasonable inspections of the work of the independent contractor. This duty is set forth in § 412 of the Restatement of Torts, Second, as follows:

> § 412. Failure to Inspect Work of Contractor After Completion.
>
> One who is under a duty to exercise reasonable care to maintain land or chattels in such condition as not to involve unreasonable risk of bodily harm to others and who entrusts the work of repair and maintenance to an independent contractor, is subject to liability for bodily harm caused to them by his failure to exercise such care as the circumstances may reasonably require him to exercise to ascertain whether the land or chattel is in a reasonably safe condition after the contractor's work is completed.

While, under land-based law, as reflected in § 412 of the Restatement of Torts, Second, the duty of inspection arises at the completion of the work, it is the practice in the maritime industry for the crew of a vessel to observe cargo operations *during* the cargo loading process to protect both the ship and its cargo, as the record in the instant case illustrates (J.A. 22-

25).[12] The reason for this is obvious, -- waiting until the completion of the cargo loading operation to make an inspection is not feasible. If cargo is broken or damaged during cargo loading operations, or stowed improperly, the crew can not wait until all the cargo is loaded to find this out because, in the course of cargo loading operations, cargo will be covered up with other cargo. For this reason, the presence of crew members on the deck of a ship observing cargo operations while the cargo operations are in progress is more than a custom or practice -- it is an absolute necessity, essential to the ship's business and safety. Therefore, since it is the practice in the maritime industry for the crew of a ship to observe cargo operations while they are in progress, recognition as part of maritime negligence law of the "principle" that a shipowner, who has hired an independent contractor stevedore to perform the work of loading cargo aboard its ship, has a duty to make "reasonable" (not continuous) inspections of that work, would not be imposing any additional burden on the shipowner, but would only be recognizing as true in law that which already is true in fact.

One of the reasons given by the Third Circuit in the *Derr* opinion for its holding that the vessel's duty of care did not extend to the condition of a cargo stow was that holding a vessel responsible for the condition of a cargo stow would require the vessel to make "continuing" inspections of the cargo "at each subsequent port which encountered the condi-

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[12]When the *Derr* case was tried, counsel for Derr offered testimony of the custom and practice in the maritime industry for the crew of a vessel to observe cargo loading operations, *see Derr v. Kawasaki Kisen K.K.*, 835 F.2d at 493-494. While the offer of this testimony was rejected in *Derr* on grounds that it would not alter the vessel's legal duty, *id.* at 835 F.2d 494, the existence of this custom and practice was not denied.

tion of the stow," *see Derr,* 835 F.2d at 494. There are two answers to this argument.

First, the duty under land-based law is not to make continuous inspections, but to make "reasonable" inspections. What is a "reasonable" inspection is a factual issue which will vary from case to case depending on the nature of the cargo, the manner in which it is stowed, and any risks or dangers to be perceived.

Secondly, holding a vessel responsible for inspecting the condition of a cargo stow at each subsequent port at which that cargo stow may be encountered is no different from holding a vessel responsible for inspecting the condition of the ship and its "gear, equipment, tools and work space to be used in the stevedoring operations," *Scindia, supra,* 451 U.S. 167, at each subsequent port where *they* may be encountered. Such inspections are at the heart of the vessel's duty under *Scindia* to provide a vessel which is in such condition that cargo operations may be carried on with reasonable safety, *Ibid.* Since, in point of fact, as the record in the instant case demonstrates, the practice in the maritime industry is for the crew to observe cargo operations in the unloading port as well as in the loading port (J.A. 24-25), expecting the vessel to observe the condition of a cargo stow at each port in which that stow may be encountered would only be recognizing as a legal duty that which, factually, already is being done.

If the Congressional objective to promote vessel safety by imposing liability for negligence on shipowners "such as would render a land-based third party in non-maritime pursuits liable under similar circumstances"[13] is to be achieved,

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[13]House Report No. 92-1441, 1972 U.S. Code. Cong. and Adm. News 4698, at 4704, quoted in text, *supra,* at page .

recognition as part of maritime negligence law of the shipowner's obligation to make "reasonable" inspections of the work performed on the ship by independent contractors, including independent contractor stevedores, under the principle of land-based law set forth in Section 412 of the Restatement of Tort, Second, is essential. For this reason, the Third Circuit's denial of the existence of such a duty in *Derr* should now be rejected.

4. The Third Circuit's holding in *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3rd Cir. 1987), that the shipowner's duty of duty of care extends only to the ship and its equipment, and not to stowed cargo, is in conflict with the intent of Congress that shipowners should be responsible for dangerous "conditions" aboard vessels.

In *Scindia,* this Court held that the vessel's duty of care extended to the condition of the "ship's gear, equipment, tools and *work space* to be used in the stevedoring operations," *Scindia, supra,* 451 U.S.at 167 (Emphasis supplied). The Third Circuit, in *Derr*, held that the term "work space," as used in the *Scindia* opinion, was limited to the "physical work space" of the vessel, and that since the foregoing language from the *Scindia* opinion did not specifically mention a condition of the ship's cargo, the shipowner had no duty of care with respect to the condition of a cargo stow, *see Derr, supra,* 490 F.2d at 495.

The distinction made in the *Derr* decision between a cargo stow and a vessel's work space is an example of the proverbial distinction without a difference. In the context of cargo operations, it is impossible to distinguish between a condition of a cargo stow and a condition of a cargo hold (work space)

where that cargo is stowed. Once cargo is stowed in the hold of a ship, it necessarily becomes part of the ship's work space because it becomes the working surface on which the longshoremen must stand to perform their duties. As the facts of the instant case illustrate, a longshoreman necessarily must stand and walk on cargo, and must climb on and off cargo onto the deck of the ship, in the course of performing his duties. If something is placed on that deck, such as a sheet of plastic in the instant case, it becomes part of the work space of the ship even though it is also a part of the cargo stow. The Third Circuit's attempted distinction between cargo and a "physical" work space of the vessel is simply illogical and unrealistic.

There is nothing in the *Scindia* opinion which would exclude the condition of a ship's cargo stow from the vessel's duty of care. Neither *Scindia*, nor *Marine Terminals v. Burnside Shipping Co.*, 394 U.S. 404 (1969), from which the "work space" terminology was taken, involved injuries resulting from the unsafe condition of a cargo stow, and the issue of a vessel's responsibility for unsafe conditions in a cargo stow was not considered in either case. In these circumstances, to read into the use of the term "work spaces" an intention to exclude the condition of a cargo stow is rather extreme, or as the Fifth Circuit put it in rejecting a similar argument, a "close reading" of *Scindia*," *see Woods v. Sammisa Co., Ltd.*, 873 F.2d 842, 848 (5th Cir. 1989), *cert. denied*, 493 U.S. 1050 (1990).

The *Derr* decision's narrow interpretation of the term "work space" to limit the vessel's duty of care is in conflict with the Congressional intent to create a broad negligence remedy as a means of encouraging vessel safety. The legislative history does not make any distinction between a condition of the ship and a condition of the ship's cargo. Rather, the

legislative history speaks only in terms of dangerous "conditions," stating:

> ". . . . Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous *condition*." (Emphasis supplied)[14]

The Third Circuit's distinction between cargo and physical work spaces of a vessel nowhere appears in the Act or its legislative history and severely limits the ability of the Act's negligence remedy to achieve its remedial objective of encouraging vessel safety. As this Court noted in similar circumstances in *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979), at 271:

> ". . . . Consequently, as we have done before, we must reject a 'theory that nowhere appears in the Act, that was never mentioned by Congress during the legislative process, that does not comport with Congress' intent, and that restricts . . . a remedial Act . . . .'"

For these same reasons, the distinction in *Derr* between cargo and the physical work spaces of a vessel should also be rejected.

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[14]House Report No. 92-1441, 1972 U.S. Code. Cong. and Adm. News 4698, at 4704, reproduced in the Appendix to the Petition for Writ of Certiorari filed herein at p. 22a.

5. The Third Circuit's holding in *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3rd Cir. 1987), that the shipowner's duty of inspection does not extend to the manner in which cargo is stowed aboard a vessel, is in conflict with the intent of Congress that the 1972 Act provide relief for American employer stevedores, not shipowners.

A fundamental error in the Third Circuit's decision in *Derr, supra*, is its misconception of the purpose of the 1972 Amendments to Section 5(b) of the Act.

The *Derr* court viewed the amendments to Section 5(b) of the Act as being primarily intended to grant relief to shipowners from unseaworthiness liability, and as reflecting a Congressional intent to relieve a vessel from responsibility for conditions "'caused by the negligence or other defaults of the stevedore,'" and as "limiting the vessel's potential liability for injuries caused by faulty stowage of cargo to certain narrow circumstances," *see Derr, supra,* 835 F.2d at 493.

This view of the purpose of the 1972 Amendments to Section 5(b) of the Act is fundamentally wrong. The purpose of the 1972 Act was not to provide relief for shipowners -- who needed no relief -- but to provide relief for American stevedores from the consequences of cases such as *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956), and *Italia Societa v. Oregon Stevedoring Co.*, 376 U.S. 315 (1964).

To understand what the 1972 Amendments to Section 5(b) were intended to accomplish, it is necessary to go back to the state of the law as it existed prior to 1972. While it is familiar history that, prior to 1972, by virtue of the decision

in *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946), a longshoreman could sue a vessel on the no-fault theories of unseaworthiness and breach of the non-delegable duty to provide a safe place to work, and that, under *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956), the vessel could bring an action for indemnity over against the stevedore employer for breach of the warranty of workmanlike service, what is missing from many judicial opinions, and is certainly missing from the *Derr* opinion, is an appreciation of how far the *Ryan Stevedoring* indemnity action had evolved, and the impact this evolution had on vessel liability.

The most striking example of this evolution was in *Italia Societa v. Oregon Stevedoring Co.*, 376 U.S. 315 (1964). In *Italia Societa*, a longshoreman was injured as a result of the breaking of a rope which was supplied for use on the vessel by his stevedore employer. In the third-party action brought by the longshoreman against the vessel, the vessel was found to be liable on the grounds of unseaworthiness, but not on negligence, based on the defective condition of the rope, see 376 U.S. at 317. There was no proof that the vessel had knowledge of the defective condition of the rope and none was necessary to establish unseaworthiness liability.[15] The vessel, in turn, brought an action over against the longshoreman's stevedore employer on the theory that it was liable under *Ryan Stevedoring* for providing a defective rope. However, the defect in the rope was "latent" and there was no proof that the stevedore had, itself, been negligent in provid-

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[15] *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946); *cf. Mahnich v. Southern S.S. Co.*, 321 U.S.96 (1944).

ing the rope. Nonetheless, this Court held that the stevedore was liable solely on the basis that it had *supplied* the rope.[16]

The effect of the decision in *Italia Societa, supra*, was that, in most cases, the only liability a vessel would ever have to a longshoreman for either unseaworthiness or negligence would exist only for that fleeting moment of judicial time between the entry of judgment in favor of the longshoreman against the vessel and the entry of judgment in favor of the vessel over against the stevedore. The *Ryan Stevedoring* indemnity action had evolved to the point where it had effectively abolished *Sieracki*, as the longshoreman's unseaworthiness remedy had become the stevedore's, and not the vessel's, liability. The 1972 Amendments did not abolish the shipowner's liability for unseaworthiness, -- that liability already had been effectively abolished by *Italia Societa, supra*. What the 1972 Act did was to reimpose liability on shipowners for negligence in a form in which that liability could not be pushed back on the stevedore.[17]

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[16]This Court stated, *Italia Societa v. Oregon Stevedoring Co.*, 326 U.S. at 324:

"Where the shipowner is liable to the employees of the stevedore company as well as it employees for failing to supply a vessel and equipment free from defects, regardless of negligence, we do not think it unfair or unwise to require the stevedore to indemnify the shipowner for damages sustained as a result of injury-producing defective equipment *supplied* by a stevedore in furtherance of its contractual obligations." (Emphasis supplied)

[17]It is, of course, true that in a pure *Sieracki* case involving a latent defect in ship's equipment, rather than equipment provided by the stevedore, the ship would not have been entitled to indemnity under the decision in *Italia Societa*. However, the frequency of such incidents was not great, and relief for the shipowner from such liability is not mentioned in the legislative history and certainly was not a motivating factor in bringing about the 1972 Act.

It was *Ryan Stevedoring*, not *Sieracki*, which led to the 1972 Amendments to the Act, and, as a review of the Act's legislative history discloses, the 1972 Act was intended as remedial legislation for American stevedores, to be achieved with minimum loss to the rights of longshoremen, and with its major onus falling on shipowners through the Act's imposition on them of liability for negligence in a form in which this liability could not be shifted back to the stevedore, even if, in a given case, that result might seem inequitable, *cf. Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 271-273 (1979).

The 1972 Act provided financial relief for stevedore employers in three ways. First, it abolished the shipowner's right to bring a *Ryan Stevedoring* indemnity action against an employer stevedore, thereby capping the employer's potential liability to an injured longshoreman at the amount of the workmen's compensation benefits payable under the Act.

Second, the elimination of the vessel's indemnity action operated to revive as a source of potential revenue for stevedores the ability to make meaningful recoveries of compensation liens where a longshoreman was successful in bringing a third-party action, *see Bloomer v. Liberty Mutual Ins. Co.*, 445 U.S. 64 (1980), *cf. Edmonds v. Compagnie Generale Transatlantique, supra.*

Third, the elimination of the vessel's indemnity action also served to remove the employer stevedore as an active participant in the longshoreman's third party litigation, with a resulting saving of legal fees. However, this removal of the stevedore as an active participant in the litigation process, also had the consequence of depriving the courts of the presence of the party best in position to be a forceful advocate for interpretations of the Act which would be consistent with its

intended purpose of providing relief for stevedores, thereby leaving to the injured longshoreman the role of a statutory surrogate (by reason of having to repay the compensation lien) for his employer's interests.

Injured longshoremen both gained and lost as a result of the 1972 Amendments. They gained a substantial increase in their workmen's compensation benefits, but lost the right to an almost certain damage recovery in third party actions based on unseaworthiness and breach of the non-delegable duty to provide a safe place in which to work, a result which, in terms of overall financial recovery by injured longshoremen, undoubtedly is a net loss, albeit that this loss is mitigated by the increase in compensation benefits.

Shipowners lost as a result of the 1972 Amendments because they became liable for injuries caused by negligence -- a liability which they theretofore had been escaping under the *Ryan Stevedoring* indemnity cases.

Given this clearly manifested intention that the 1972 Amendments were designed to provide relief for employer stevedores, and not for, but at the expense of, shipowners, coupled with the adoption of a negligence remedy for the purpose of encouraging vessel safety, the view of the Third Circuit, as expressed in the *Derr* decision, that the 1972 Amendments were intended to give relief to shipowners is patently in error, and should be rejected in favor of a judicial approach to interpreting the Act which accomplishes what Congress intended.

When this Court, in *Scindia, supra,* held that the shipowner did not have a duty to supervise the work of a stevedore while that work was in progress, it did so on the basis of the right of a shipowner to rely on the stevedore employer to

avoid exposing its employees to unreasonable hazards, *see Scindia, supra,* 451 U.S. at 170. Under the decision in *Derr*, as the facts of the instant case illustrate, and in stark contrast to the situation which this Court was addressing in *Scindia, supra*, a shipowner will be relieved from liability for a dangerous condition in a cargo stow even though neither the injured longshoreman nor his stevedore employer know of the condition, and even though the injured longshoreman and his stevedore employer are not in a position to avoid or prevent the condition. By holding that the shipowner has no duty of inspection to discover dangerous conditions in a cargo stow, the *Derr* decision shifts the economic burden of a substantial number of negligently caused injuries from the ship back to the injured longshoreman and his stevedore employer, precisely the type of result which the 1972 Amendments were intended to prevent.

Because it is in conflict with the intent and purpose of the 1972 Amendments, the *Derr* decision should be rejected, and the decision below in the instant case, which is based on the *Derr* decision, should be reversed.

6. The Third Circuit's holding in *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3rd Cir. 1987), that a shipowner has no duty of care with respect to hazardous conditions in a cargo stow which are "open and obvious" is contrary to this Court's decision in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981), and is in conflict with the legislative intent that Section 5(b) of the Act be implemented in a manner which will encourage vessel safety.

In *Derr*, the Third Circuit, in holding that the vessel had no duty of inspection to discover dangerous conditions existing

in a cargo stow, also held that the only responsibility which a vessel had with respect to a cargo stow was to give warning of hazardous conditions of which it was shown to have *actual* knowledge, and that if the hazardous condition was "open and obvious," then the shipowner did not even have the duty to give warning and, in effect, had no duty at all, *see Derr, supra,* 835 F.2d at 496-497. In support of its holding that the ship had no duty beyond the giving of warning, and no duty at all as to "open and obvious" conditions, the *Derr* decision cited this Courts opinion in *Scindia, see Derr, supra, 835 F.2d at 497.*

Derr's citation of *Scindia* for the proposition that a shipowner would not be liable for "open and obvious" conditions clearly was in error, for, in *Scindia*, this Court decided precisely the opposite, rejecting the shipowner's contention that it had no duty with respect to open and obvious conditions, *see Scindia, supra,* 451 U.S. at 167-168.

Since *Scindia* was decided, every Court which has had occasion to consider the issue, other than the *Derr* Court, has rejected the contention that a shipowner is not liable for "open and obvious" conditions, and has specifically cited *Scindia* as the authority for the proposition that the fact that a condition is "open and obvious" is not a defense in suits by longshoremen under Section 5(b) of the Act, *see Moore v. M.P. Howlett,* 704 F.2d 39, 42 (1983), *Harris v. Reederei*, 657 F.2d 53, 54-55 (4th Cir. 1981), *see Woods v. Sammisa Co., Ltd.*, 873 F.2d 842, 852, f.n. 13 (5th Cir. 1989), *cert. denied*, 493 U.S. 1050 (1990), *Martinez v. Korea Shipping Corp., Ltd.*, 903 F.2d 606, 610 (9th Cir. 1990), cited and followed in *Riggs v. Scindia Steam Nav. Co.*, 8 F.3d 1442 (9th Cir. 1993).

In addition, since the *Derr* case was decided, another panel of the Third Circuit, in a non-cargo stow case, has retreated from the position that a shipowner is not responsible for "open and obvious" conditions, but distinguished *Derr* on its facts, *Kirsch v. Plovidba*, 971 F.2d 1026, 1031 f.n. 7 (3rd Cir. 1992). Consequently, at least for the present, the rule in the Third Circuit is that a shipowner has no responsibility for "open and obvious" conditions in a cargo stow.

In the instant case, the District Court Judge who decided the respondent's motion for summary judgment, took the "open and obvious" defense a step further, and applied it to circumstances in which it clearly had no application. In response to petitioner's efforts to prove that the vessel had "actual knowledge" of the presence of the plastic under the cocoa beans on the basis of the testimony of the ship's Captain that crew members were present during the loading operation and would have seen it (J.A. 22-24), the District Court held that this evidence would only prove that the condition was open and obvious and that, under *Scindia*, a shipowner was not liable for open and obvious conditions (J.A. 46).

Not only was the District Court's citation of *Scindia* clearly in error, but it is a *non sequitur* to suggest that just because a condition was open and obvious to the crew when the cargo was being loaded in Ecuador, that it would be open and obvious to longshoremen weeks or months later when it was being unloaded in Philadelphia. These are two different times and places. The evidence was that the plastic was covered up by the cargo that was placed on top of it (J.A. 11), and was not visible to the longshoremen in Philadelphia until

after the accident to petitioner, and, therefore, not open and obvious to them.[18]

On the record in this case, in view of petitioner's testimony that he did not see the plastic on the deck before the accident, was not warned of it, had no reason to expect it would be there, and thought he was stepping down onto paper (J.A. 11-14), whether the presence of the plastic was an open and obvious condition to the unloading longshoreman in Philadelphia, is, at best, a factual issue, not suitable for determination on a motion for summary judgment. Moreover, at least on the present record, it is not an issue at all, as no witness has testified that the Philadelphia longshoremen knew of the presence of the plastic on the deck of the hold prior to petitioner being injured. Unfortunately, the Third Circuit, by affirming the decision of the District Court by Judgment Order, has allowed what is a patently erroneous holding to stand. We submit that it should now be rejected, as should the *Derr* holding that a vessel has no duty of care with respect to open and obvious conditions in a cargo stow, as it is clearly in conflict not only with this Court's decision in *Scindia*, but with overwhelming authority to the contrary, *e.g.*, *Moore v.*

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[18]In the court below, the respondent shipowner sought to show that the plastic was visible to the longshoremen by citing the testimony of the stevedore ship boss, Raymond McMullen, and a fellow longshoreman working in the hold, Joseph Fisher, that they saw the plastic. However, the testimony of both these witnesses was that they saw the plastic *after* Howlett was injured, not before. Ship boss McMullen testified that he was standing on the vessel's weather deck, and that after the accident happened, Howlett came up and reported it to him, and at that point, after the bags had been cleared, he was able to look down and see the plastic (J.A. 38). Fellow longshoreman Fisher testified that he did not realize there was plastic on the deck until after he went over and looked down into the area where petitioner fell, at which point he was first able to see the plastic (J.A. 41).

M.P. Howlett, supra, Harris v. Reederei, supra, Woods v. Sammisa Co., Ltd., supra, Martinez v. Korea Shipping Corp., Ltd., supra, Riggs v. Scindia Steam Nav. Co., supra.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the Judgment of the Court of Appeals affirming the Judgment of the District Court should be reversed, that the Judgment of the District Court granting summary judgment in favor of respondent should be reversed, and that the case should be remanded to the District Court for trial on the merits.

Respectfully submitted,

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